



**Developments in Equal Pay Law:
The Lilly Ledbetter Act and Beyond**

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**“Time After Time” — Compensation Litigation
After the Ledbetter Fair Pay Act**

Presented by

Gary R. Siniscalco

ORRICK, HERRINGTON & SUTCLIFFE LLP

THE ORRICK BUILDING

405 Howard Street

San Francisco, California 94105-2669

Telephone: 415-773-5700

www.orrick.com

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Developments in Equal Pay Law: The Lilly Ledbetter Act and Beyond

Prepared by Gary Siniscalco, Andrew Livingston, Oswald Cousins, Tina Tran and Renee Phillips

I. Introduction

After decades of relative inactivity, 2009 proved a watershed year in the world of equal pay. One of President Obama's very first acts after taking office in January 2009 was to sign into law the much anticipated Lilly Ledbetter Fair Pay Act (the "Ledbetter Act"), which greatly lengthened the statute of limitations for discriminatory pay claims and, in the process, rolled back the United States Supreme Court's heavily criticized ruling in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.* President Obama announced the signing of the Ledbetter Act to much fanfare.

It is obvious that President Obama intends the Ledbetter Act to rectify what he views as a systemic problem with equal pay among American workers. But it is equally clear that the Ledbetter Act is just the first among many efforts in this area. Indeed, when he signed the Ledbetter Act, President Obama explained:

[t]his bill is an important step . . . And this is only the beginning. I know that if we stay focused, as Lilly [Ledbetter] did - and keep standing for what's right, as Lilly did - we will close that pay gap and ensure that our daughters have the same rights, the same chances, and the same freedom to pursue their dreams as our sons.¹

Consistent with this philosophy, President Obama is a strong proponent of two Congressional proposals put forth in early 2009 that will drastically reengineer equal pay law. If passed, the two pieces of legislation – the Paycheck Fairness Act and the Fair Pay Act of 2009 – will pave the way for a flood of equal pay claims that will be more challenging and difficult for employers to defend.

This paper analyzes the Ledbetter Act and the pending equal pay legislation, and in the process, it provides practical guidance for employers as they navigate this evolving area of the law.

II. The Lilly Ledbetter Fair Pay Act

A. The Supreme Court's Ruling in *Ledbetter v. Goodyear Tire & Rubber Co.*

The Ledbetter Act was passed in response to the 2007 Supreme Court decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007). Plaintiff Lilly Ledbetter worked for Goodyear at its Gadsden, Alabama, plant from 1979 until 1998. During much of this time, salaried employees at the plant were given or denied raises based on their supervisors' evaluations. By 1997, Ledbetter's male colleague's salaries were 15 to 40 percent more than what she received.

In March 1998, Ledbetter submitted a questionnaire to the EEOC alleging certain acts of sex discrimination, and in July of that year she filed a formal EEOC charge. After taking early

¹ http://voices.washingtonpost.com/44/2009/01/29/obama_signs_lilly_ledbetter_ac.html



retirement in November 1998, Ledbetter filed a discrimination action against Goodyear, asserting claims under Title VII and the Equal Pay Act.

Ledbetter's discrimination claims were based on alleged disparate treatment in connection with her pay as a Goodyear employee. However, Ledbetter did not assert that the relevant Goodyear decision-makers acted with actual discriminatory intent, either when they issued her checks during the charging period or when they denied her a raise in 1998. Rather, she argued that the paychecks were unlawful because they would have been larger had she been evaluated in a nondiscriminatory manner *prior to* the charging period. Ledbetter argued that Goodyear's conduct during the charging period gave present effect to discriminatory conduct that had occurred outside of the charging period.

The district court granted summary judgment in favor of Goodyear on several of Ledbetter's claims, including her Equal Pay Act claim, but it allowed her Title VII pay discrimination claim to proceed. At trial, Ledbetter introduced evidence that (1) several supervisors had given her poor evaluations because of her gender, (2) that as a result of these evaluations her pay was not increased as much as it would have been if she had been evaluated fairly, and (3) these past pay decisions continued to affect the amount of her pay throughout her employment. Goodyear maintained that the evaluations had been nondiscriminatory. The jury found for Ledbetter and awarded her \$3.5 million in damages.

On appeal, Goodyear contended that Ledbetter's pay discrimination claim was time-barred with respect to all pay decisions made prior to September 26, 1997, which was 180 days before the filing of her EEOC questionnaire. Goodyear further argued that no discriminatory act relating to Ledbetter's pay occurred after that date. The Eleventh Circuit reversed the lower court, holding that a Title VII pay discrimination claim cannot be based on any pay decision that occurred prior to the last pay decision that affected the employee's pay during the EEOC charging period. The Court of Appeals then concluded that there was insufficient evidence to prove that Goodyear had acted with discriminatory intent in making the only two pay decisions that occurred within the 180-day charging period. Ledbetter appealed.

The United States Supreme Court, in a sharply divided 5-4 opinion, affirmed the Eleventh Circuit's dismissal of Ledbetter's claims. The Court rejected Ledbetter's argument that each paycheck she received violated Title VII and triggered a new EEOC charging period, reasoning that such an interpretation would dispense with the element of discriminatory intent required for a disparate treatment claim. As Ledbetter made no claim that intentionally discriminatory conduct occurred during the charging period, but had only claimed that nondiscriminatory conduct gave present effect to past discriminatory conduct, she could not state a claim of relief. In short, the Court held that "current effects alone cannot breathe life into prior, uncharged discrimination."

Justice Ginsburg, writing for an angry dissent, responded that "[t]he Court's insistence on immediate contest overlooks common characteristics of pay discrimination. Pay disparities often occur, as they did in Ledbetter's case, in small increments; cause to suspect that discrimination is at work develops only over time. Comparative pay information, moreover, is often hidden from the employee's view." The dissent therefore distinguished pay disparities from other adverse actions such as termination, failure to promote or refusal to hire, all of which involve discrete acts that are



“easy to identify” as discriminatory. In light of the difficulties employees have in identifying pay discrimination, the dissent argued that Ledbetter’s “initial readiness to give her employer the benefit of the doubt should not preclude her from later challenging the then current and continuing payment of a wage depressed on account of her sex.” The dissent looked to Congress to “correct this court’s parsimonious reading of Title VII.”

B. The Ledbetter Act

Ledbetter was widely criticized by employee groups, unions, members of the Democratic Party, and numerous others, and it became a hotly debated issue in the 2008 Presidential Race. In fact, Lilly Ledbetter herself actively campaigned for Barack Obama and ultimately cut a commercial in support of his candidacy. Upon Obama's election, then, it was not a surprise that the new Democratic majority in Congress took Justice Ginsburg up on her request and reacted to *Ledbetter* by drafting and passing the Ledbetter Act. Likewise, it came as no surprise that President Obama, with Lilly Ledbetter at his side, signed into law the Ledbetter Act, the first bill he signed upon taking office.²

While President Obama portrayed the Ledbetter Act as a "simple fix,"³ the new law is a substantial change and dramatically increases employers' risk and exposure to pay discrimination claims. The Act, retroactive to May 28, 2007 (the day before *Ledbetter* was decided), effectively overturns the Supreme Court's 2007 ruling, but it also does much more. Specifically, it amends Title VII,⁴ the Americans with Disabilities Act of 1990 (ADA),⁵ the Rehabilitation Act of 1973,⁶ and the Age Discrimination in Employment Act of 1967 (ADEA)⁷ to specify that unlawful discrimination occurs when: (1) “a discriminatory compensation decision or other practice is adopted,” (2) “when an individual becomes subject to a discriminatory compensation decision or other practice,” or (3) “when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.” (emphasis added).

Under this "paycheck rule," the statute of limitations for filing a wage claim resets each time the employee receives a paycheck, benefits or other compensation. An employee can recover back pay and other relief for up to two years preceding the filing of a charge where the unlawful employment practices that occurred during the charge filing period are similar or related to practices that occurred previously.

Importantly, the Act expands the definition of an unlawful employment practice to not only include discrete "decisions" regarding compensation, but to include any "other practice" that affects an employee's compensation. The term “other practice” is not defined in the Act, leading to uncertainty about how broadly this language will be construed and inconsistency thus far from lower court decisions addressing this issue.

² Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2.

³ http://voices.washingtonpost.com/44/2009/01/29/obama_signs_lilly_ledbetter_ac.html

⁴ See Civil Rights Act of 1964, § 706(e), 42 U.S.C. 2000e-5(e) (effective May 28, 2007).

⁵ See Americans with Disabilities Act of 1990, 42 U.S.C. 12111 et seq., 12203 (effective May 28, 2007).

⁶ See Rehabilitation Act of 1973, §§ 505(a), 29 U.S.C. 791, 794.

⁷ See Age Discrimination in Employment Act of 1967, § 7(d), 29 U.S.C. 626(d) (effective May 28, 2007).



In summary, the overall impact of the Ledbetter Act is to

- Reset the statute of limitations for filing a wage claim each time an employee receives a paycheck, benefits, or “other compensation,” allowing employees to bring wage claims years after the alleged discrimination initially occurred
- Apply to alleged discriminatory pay practices based on all protected categories, including race, gender, age, color, disability, national origin and religion
- Expand the definition of an unlawful employment practice to not only include discreet “decisions” regarding compensation, but to include any “other practice” that affects an employee’s compensation, and
- Create greater burdens for employers to defend against or mitigate liability given that the alleged discriminatory decisions, practices or events may have occurred many years before.

C. Cases Applying the Ledbetter Act

Barely a year old, the Ledbetter Act has nonetheless received an unusual amount of judicial attention: more than sixty decisions have addressed the Ledbetter Act in one way or another over the past year. Below, we highlight some important developments and themes from the cases.⁸

1. General Application of the Ledbetter Act

As expected, since the Ledbetter Act was enacted, plaintiffs have succeeded in proceeding with current wage discrimination claims years after the alleged discriminatory acts occurred. For instance, in *Vuong v. N.Y. Life Ins. Co.*, No.03 Civ. 1075, 2009 WL 306391 at *8-9 (S.D.N.Y. Feb. 6, 2009), the plaintiff, who is Chinese, pursued a wage discrimination case against his employer based on the employer's decision in February 1998 to allocate a lesser percentage of the company's performance-related compensation to him than his Caucasian co-Managing Partner. This allocation split continued for several years, and plaintiff argued that he continued to receive less pay than his counterpart as a result. While the February 1998 decision occurred considerably more than 300 days before plaintiff filed his EEOC complaint, the court ultimately found that plaintiff's claim was "expressly declared to be timely" under the Ledbetter Act because, per plaintiff, the paychecks he received within the statutory period would have been larger but for the company's 1998 decision.

Furthermore, while the Ledbetter Act is most recognized for saving gender discrimination claims such as those raised by namesake Lilly Ledbetter, cases like *Vuong* have confirmed that the Act applies to discriminatory pay practices based on other categories protected by Title VII, the ADA, the Rehabilitation Act, and the ADEA. *See also, e.g., Bush v. Orange County Corr. Dep't*, 597 F.Supp.2d 1293, 1295-96 (M.D.Fla. 2009) (holding that plaintiffs' claims regarding race-based pay decisions are no longer administratively barred). Nevertheless, at least one court has disapproved of any attempt to extend the Ledbetter Act to EEO claims not enumerated in the Act. *See Equal*

⁸ In addition, attached at Appendix A is a brief summary of the cases referencing the Ledbetter Act since its passage.



Employment Opportunity Comm'n v. CRST Van Expedited, Inc., 615 F.Supp.2d 867, 876 (N.D.Iowa 2009) (court refused to apply Ledbetter Act to sexual harassment pattern or practice claim that was wholly unrelated to compensation, noting that "[t]here is no indication Congress intended the Ledbetter Act to serve as a trump card that the EEOC might use to supersede all statutes of limitations in our nation's various civil rights acts.")

2. Decisions That Were Not Discriminatory at the Time They Were Made Are Not Actionable

In *AT&T v. Hulteen*, 129 S.Ct. 1962, 1964-65 (2009), the United States Supreme Court weighed in on the Ledbetter Act with a subtle, but important clarification: a decision must be discriminatory *at the time it occurred* for it to serve as the trigger for a claim. In *Hulteen*, the plaintiff female employees claimed that the employer's pension plan was discriminatory because the employer did not give them retirement credit for their pregnancy leave even though it gave credit for other types of medical leave. However, because the employer made this decision before the 1978 Pregnancy Discrimination Act became law, the decision was not discriminatory, and the Ledbetter Act could not otherwise revive the claim.

3. The Ledbetter Act's Application to "Other Compensation"

The Ledbetter Act states that the statute of limitations clock runs from the time any "wages, benefits, or other compensation" is paid. As explained above, the Act itself offers absolutely no guidance as to what "other compensation" means. Not surprisingly, much of the case law addressing the Ledbetter Act has focused on exactly this issue.

A recent district court opinion considered whether the Ledbetter Act extended to pension benefits. After reviewing the text of the statute, the court held that pension benefits are precisely the type of "other compensation" that the Act could plausibly include. *Tomlinson v. El Paso Corporation*, D. Colo., No. 04-cv-02686-WDM-MEH, 2009 WL 2766718 at *4 (D. Colo. Aug. 28 2009). While the court swept pension benefits into the category of "other compensation," it rejected the contention that the Ledbetter Act requires a new statute of limitations to be triggered by each retirement check received, even where the retirement check is lower because of a previous discriminatory decision.

The court noted that were the rule otherwise, employees would be able to stretch the limitations period beyond the end of the employment relationship. This result, the court explained, would be inconsistent with the Act, which states on its face that it is not intended to "change current law treatment of when pension distributions are considered paid."⁹ This language preserves the rule that "pension distributions are considered paid upon entering retirement and not upon the issuance of each annuity check." See H.R. Rep. No. 110-237, at 18 (2007), *citing Florida v. Long*, 487 U.S. 223, 239 (1988); *Maki v. Allele, Inc.*, 383 F.3d 740, 744 (8th Cir. 2004).

⁹ Ultimately, the court in *Tomlinson* allowed plaintiff's age discrimination claim to proceed because the plaintiff challenged the rate at which his pension benefits accrued before they were paid out. The timeliness of his claim, therefore, did not turn on receipt of a post-retirement check, rather it turned on the *accrual* of benefits while plaintiff was still employed.



The D.C. Circuit considered the "other compensation" issue in *Schuler v. PricewaterhouseCoopers, LLP* No. 08-7115, 2010 WL 522345 (D.C. Cir. Feb. 16, 2010). There, the court addressed whether the term "compensation decision or other practice" could be construed to include a failure to promote. Schuler alleged that he was denied a promotion to partnership based on his age and, as a result, he received less compensation than he would have received as a partner. The D.C. Circuit affirmed the district court's dismissal of Schuler's ADEA claim, holding that the Ledbetter Act's prohibition of "discrimination in compensation" through a "discriminatory compensation decision or other practice" does not refer to "the decision to promote one employee but not another to a more remunerative position." As Schuler's failure-to-promote claim was not a claim of "discrimination in compensation," the Ledbetter Act could not revive Schuler's otherwise untimely claim under the ADEA.

Prior to *Schuler*, there had been a split in authority as to whether the Ledbetter Act applied to claims based on demotions or failures to promote, with only the quality of the plaintiffs' pleadings appearing to distinguish the various cases. In *Bush v. Orange County Correctional Department*, the court held that the Ledbetter Act covered plaintiffs' claim regarding position transfers because plaintiffs clearly asserted that the transfers they received in 1990 "had been recorded as a voluntary demotion and their pay had been reduced without their knowledge." 597 F.Supp.2d 1293, 1295-96 (M.D.Fla. 2009). Another district court allowed plaintiff's denial of tenure claim to proceed because plaintiff alleged it deprived her of an increase in salary. *Gentry v. Jackson State Univ.*, 610 F.Supp.2d 564, 566-67 (S.D.Miss. 2009). In contrast, where plaintiffs have failed to assert that a failure to promote affected their compensation, courts refused to presume a connection to their pay and therefore did not apply the Ledbetter Act. See, e.g., *Rowland v. Certainteed Corp.* No. 08-3671, 2009 WL 1444413 at *6 (E.D.Pa. May 21, 2009) ("[T]he Ledbetter Act does not help Plaintiff here because she pressed no discriminatory compensation claim with respect to her failure to promote"); *Vuong v. New York Life Ins. Co.*, Civ. A. No. 03-1075, 2009 WL 306391, at *7-9 (S.D.N.Y. Feb. 6, 2009) (failure to promote claim time-barred on similar grounds).

Courts have reached conflicting results in other contexts as well. For example, in *Gilmore v. Macy's Retail Holdings*, No. 06-3020, 2009 WL 305045 at *1-3 (D. N.J. Feb. 4, 2009), the court went so far as to hold that an employer's failure to permit an employee to fill in for absent associates affected plaintiff's compensation because plaintiff alleged that it deprived her of an opportunity to earn bonuses on sales of more expensive products. Compare that to *Leach v. Baylor College of Medicine*, Civ. A. No. 07-0921, 2009 WL 385450, at *17 (S.D.Tex. Feb. 17, 2009), where the court held that the Ledbetter Act did not apply to plaintiff's race discrimination claim where plaintiff only alleged that he had a heavier workload than his peers without any evidence of a corresponding pay differential.

There are few conclusions that may safely be reached from the various early interpretations of the "other compensation" language in the Ledbetter Act. It is apparent, though, that plaintiffs lawyers are aggressively pushing the boundaries in an effort to create actionable claims out of decisions made in the past. It is equally obvious that at some point at least, the plain language of the statute may be used effectively by employers to blunt some of the more aggressive theories asserted by employees, as it was in *Schuler*. Ultimately, however, this is an issue that will be the focus of an ongoing battle between plaintiffs and defendants, at least until the Supreme Court, or perhaps even Congress, steps in to provide clarity.



D. EEOC and OFCCP Guidance on “Other Practices”

A key element of the Ledbetter Act is its apparent expansion of the definition of an unlawful employment practice to not only include discreet "decisions" regarding compensation, but to include any "other practice" that affects an employee's compensation. However, the Ledbetter Act does not specify what “other practices” means, leaving the courts to struggle with the question.

For its part, the EEOC has provided little guidance in the matter. Although it has celebrated the passage of the Ledbetter Act, reconsidered charges that may have been dropped or not investigated based on the *Ledbetter* decision, and anticipates that the Act will lead to hundreds of additional charges each year, it has not provided a detailed explanation of how the Act should be interpreted. At most, the EEOC has updated its EEOC Compliance Manual to confirm that “[p]ayment of compensation is actionable if it is affected by either a discriminatory compensation decision or some other discriminatory practice.” It then attempts to shed some light on the issue by providing the following example of a discriminatory career ladder promotion:

After working for the Respondent for nearly 10 years as a production supervisor, CP learns she is being paid less than the other four production supervisors in her department, who are all men. Immediately after learning about the pay discrepancy, CP files an EEOC charge alleging sex-based wage discrimination in violation of Title VII. The investigation shows that CP generally received lower pay raises than her male counterparts as the result of lower performance ratings, which CP alleges to have been discriminatory. Although these performance ratings and related pay raises all occurred more than 300 days before CP filed her charge, they affected her pay within the filing period. Therefore, CP's pay discrimination charge is timely.

See EEOC Compliance Manual, Section 2-IV (C)(4), *available at*:
<http://www.eeoc.gov/policy/docs/threshold.html#2-IV-C-4>.

The EEOC example – or, essentially, a mirror of the *Ledbetter* case and Congress's response in enacting the Ledbetter Act – is not at all remarkable because it clearly involves decisions that affected the employee's compensation. Disappointingly, the EEOC fails to articulate its view of what “other discriminatory practice” might fall within the ambit of the Act.

As for the OFCCP, it does not seem that the Ledbetter Act will change how it audits compensation discrimination. Although the OFCCP's mission is to investigate and prevent discrimination by federal contractors under Executive Order 1146, it has claimed to follow Title VII standards when considering compensation discrimination. Accordingly, in 2006, the OFCCP adopted a new policy for assessing compensation discrimination that was similar to the standards used by the EEOC under Title VII. Among other things, the OFCCP sought to identify similarly situated employee groups, look for significant pay disparities for women and minorities in those groups, and then use a multiple regression analysis that controlled for the various factors that might explain the disparities. The OFCCP stated it would not consider any factors that were “tainted” by discrimination. *See* Federal Register, Vol. 71, No. 116 (June 16, 2006)(Interpreting Nondiscrimination Requirements of Executive Order 11246 With Respect to Systemic Compensation).



To the extent the OFCCP claimed to be following Title VII guidelines, then the Supreme Court's May 2007 decision in *Ledbetter* should have undermined the OFCCP's methodology for investigating compensation discrimination because it held that current pay disparities were not actionable if based only on discriminatory employment actions outside the statute of limitations. In other words, it was no longer appropriate to exclude factors such as prior compensation or performance reviews that were "tainted" by past discrimination. Nevertheless, in an August 22, 2007 speech addressing the National Industry Liason Group, then OFCCP Director Charles James stated that the OFCCP would "continue to use its existing standards" and advised that the *Ledbetter* decision did not excuse federal contractors from complying with OFCCP audits. The passage of the Ledbetter Act simply permits the OFCCP to continue its audits and remedial measures in the same way.

III. President Obama, Congress and the Executive Agencies Put Equal Pay on the Front Burner

President Obama has made it clear that the Ledbetter Act is just the starting point in his quest to close the pay gap between men and women. He has pledged to do all that he can to ensure that future generations join a workplace where there will be no disparity in compensation connected to gender.¹⁰ And he has committed to increase the funding for the key executive agencies who administer equal pay laws, as well as ensure that the agencies with these responsibilities are coordinating efforts and limiting potential gaps in enforcement.¹¹ Consistent with this comprehensive approach, President Obama has backed Congressional efforts to modify the equal pay provisions of the Fair Labor Standards Act, 29 U.S.C. § 206(d) ("Equal Pay Act" or "EPA"), including the Paycheck Fairness Act¹² ("PFA"), currently pending before the Senate, and the Fair Pay Act of 2009 ("FPA"), currently pending before the House.

There are numerous ways in which the PFA and FPA, if passed, would fundamentally change the EPA. Below, we discuss the current provisions of the EPA and then the four most significant amendments of the proposed legislation: (1) the addition of compensatory and punitive damages; (2) the authorization of opt-out instead of opt-in class actions; (3) the limitation on the affirmative defenses available to employers and (4) the alterations to the "equivalent job" standard. There are several other potential amendments, and we note them on Appendix B, a chart comparing the current EPA to the PFA and FPA.

A. The Equal Pay Act

Generally, Equal Pay Act claims are brought concurrently with claims for sex discrimination in compensation. A plaintiff seeking to prove an Equal Pay Act violation must show that:

¹⁰ In his State of the Union Address on January 27, 2010, President Obama announced the formation of a National Equal Pay Enforcement Task Force, explaining his intent to "crack down on violations of equal pay laws – so that women get equal pay for an equal day's work." See <http://www.whitehouse.gov/blog/2010/01/27/putting-washington-service-middle-class>. He intends the task force to improve compliance, public education, and enforcement of equal pay laws.

¹¹ <http://www.whitehouse.gov/blog/2010/01/27/putting-washington-service-middle-class>.

¹² The Paycheck Fairness Act ("PFA") passed the House on Jan. 9, 2009 as part of the Ledbetter Act. However, the Senate detached it and opted to consider it at a later date under a companion bill, S. 182.



1. employees of the opposite sex are paid different wages;
2. the employees perform equal work in jobs that require equal skill, effort and responsibility; and
3. the jobs are carried out under similar working conditions.

See Ryduchowski v. Port Authority of New York and New Jersey, 203 F.3d 135 (2d Cir. 2000); *see also* 29 U.S.C. § 206(d)(1).

If a *prima facie* EPA claim is established, the employer then has an opportunity to assert one of four statutorily-recognized affirmative defenses, by showing that the wage discrepancy is justified because it is based on:

1. a seniority system;
2. a merit system;
3. a system which measures earnings by quantity or quality of production; or
4. a differential based on a factor other than sex.

Id. If an employer sets forth evidence proving an affirmative defense, the burden then shifts back to the plaintiff to show that the employer's proffered reasons are actually a pretext for sex discrimination. *See Ryduchowski*, 203 F.3d 135.

B. Damages Under the Proposed EPA Amendments

The EPA limits plaintiffs' recovery on sex-based wage discrimination claims to backpay and liquidated damages.¹³ No compensatory or punitive damages are currently available for these claims. Moreover, liquidated damages are only available if the employer fails to demonstrate reasonable and good faith grounds for believing it complied with the EPA.¹⁴ If enacted, however, the PFA and FPA may drastically alter plaintiffs' remedies under the EPA. Specifically, the PFA and FPA amend the EPA to provide opportunities for plaintiffs to recover compensatory and punitive damages for all discriminatory wage disparities without having to prove discriminatory intent on the employer's part.¹⁵ It is clear from the congressional record that the purpose of imposing increased, uncapped

¹³ 29 U.S.C. §§ 216, 260; H.R. Rep. No. 110-783, at 30 (2008).

¹⁴ 29 U.S.C. §§ 216(d), 260.

¹⁵ The PFA and the FPA are very similar to each other with respect to damages. In fact, they track each other's language almost verbatim. H.R. 12, 111th Cong. § 3 (2009); H.R. 2151, 111th Cong. § 5 (2009). Both set forth "enhanced penalties" for employers who engage in the unlawful practices outlined in the EPA: *See, e.g.*, H.R. 2151, 111th Cong. § 5(a)(1) (2009); H.R. 12, 11th Cong. § 3(c)(1) (2009). The primary difference in wording is that the PFA stresses that "where the employee demonstrates that the employer acted with malice or reckless indifference, punitive damages ... may be appropriate...." The FPA, as introduced, only states that employers "shall additionally be liable for such compensatory or punitive damages as may be appropriate...." The PFA thus incorporates an explicit guideline for awarding punitive damages. The FPA also differs from the PFA with respect to *coverage*, which may ultimately affect damages. *See, e.g.*, H.R. 2151,



damages is to more severely punish defendant employers who violate the substantive provisions of the EPA and deter other employers from engaging in unscrupulous, discriminatory business practices.¹⁶

1. Comparing Title VII to the Proposed EPA Damages

Title VII is another statutory means of bringing wage discrimination claims.¹⁷ Title VII currently allows for limited punitive and compensatory damages. It may therefore be instructive to examine how such remedies work under Title VII as a “preview” of what we might expect under amendments to the EPA’s damages provisions. There are however, two important differences between remedies under Title VII and the proposed remedies to the EPA under the PFA and FPA:

First, compensatory and punitive damages under the proposed EPA amendments are *not* restricted or capped. Damages would – in theory – be unlimited. The only protection employers would have against excessive, conceivably astronomical compensatory and punitive damages is the 14th amendment’s due process protection, which lacks clear guidelines on the contours of “excessive,” unconstitutional remedies.¹⁸

Second, given the way claims are currently analyzed under the EPA, obtaining punitive and compensatory damages will not necessitate a showing that the employer harbored discriminatory intent (unlike Title VII). There is no obligation under the EPA to prove discriminatory animus or intent. Neither the PFA nor FPA would change that. The proposed amendments simply pour compensatory and punitive damages into the pool of remedies that plaintiffs may recover under the same claims. Because there is no obligation for the plaintiff to prove intent or discriminatory animus under the EPA, the barrier built by Title VII between remedies for claims strong enough to show intentional discriminatory treatment (subject to equitable, compensatory, and punitive relief) and remedies for claims that can only show disparate or discriminatory impact (subject to equitable relief only) is not present.

Moreover, it does not appear – either currently or under the proposed EPA amendments – that courts will be inclined to incorporate disparate impact or disparate treatment analyses into EPA cases as they have with Title VII. In fact, courts have explicitly declined to adjudicate EPA claims and Title VII disparate treatment or impact claims in the same breath, even where the behavior giving rise to claims is the same.¹⁹ Thus, without additional language in the proposed amendments or indicia in the case law that courts are willing to import the Title VII bulwark between claims that

111th Cong. §§ 1, 3 (2009). *See also supra* (discussion of coverage of FPA will presumably take place elsewhere in the article).

¹⁶ H.R. Rep. No. 110-783, at 31 (2008); *Closing the Gap: Equal Pay for Women Workers: Hearing before the S. Comm. On Health, Education, Labor, and Pensions*, 110th Cong. 10 (2007).

¹⁷ Unlike the EPA, Title VII also encompasses discrimination claims based on other protected characteristics (race, religion, disability, etc.) and employer actions.

¹⁸ *See State Farm*, 538 U.S. at 425.

¹⁹ *See, e.g., Spaulding v. Univ. of Washington*, 740 F.2d 686, 700 (9th Cir. 1984) (treating EPA and Title VII claims separately, despite their being based on wage disparities, and only using the wage disparity proof as one means of inferring intent under a disparate impact/treatment analysis); *Earle v. Aramark*, 247 Fed. Appx. 519, 523-24 (5th Cir. 2007) (plaintiff’s reliance on EPA for wage disparity claim was misplaced where she sued under Title VII and the standards for establishing a prima facie case are different).



can allege discriminatory intent and those that cannot (equitable relief versus full recovery under the statute), there is little hope at the moment for a judicially-constructed solution to the issue of unlimited relief.

In fact, the proposed amendments to the EPA suggest a possible loophole through which discriminatory wage disparity claims may sidestep the limited equitable relief provided by Title VII in favor of more expansive relief under the amended EPA. In *Spaulding v. University of Washington*, the Ninth Circuit explicitly states that wage disparity claims are simply too expansive for disparate impact analysis under Title VII. The court reasoned that although plaintiffs in the case could not show intentional discrimination and thus necessarily resorted to a disparate impact claim, attacking the entire body of wage practices for an employer is simply *not* sufficiently specific (with respect to the employer’s practice giving rise to the disparity) to survive scrutiny under Title VII’s disparate impact standards.²⁰ According to the *Spaulding* court, Title VII was never intended to address such wage disparity claims.²¹

In contrast, plaintiffs do not have to show the high level of specificity in an employer’s wage practices under the current EPA that they must under Title VII disparate impact analysis. To recover for a discriminatory wage disparity claim under the EPA, plaintiffs must essentially prove that there is: a) a wage disparity bearing on gender; and b) that this disparity exists despite men and women doing substantially equal work.²² There is no requirement under the EPA that plaintiffs point to a very specific wage practice giving rise to the wage disparity; they may attack the entire body of wage practices for an employer as long as those practices concern (and plaintiffs show) “substantially equal work.” As it now stands (without the PFA or FPA amendments), the EPA only allows equitable relief and liquidated damages for such general wage disparity claims. Thus, where Title VII demands proof of very specific wage practices to recover equitable relief that plaintiffs cannot provide, the EPA steps in and allows wage disparity plaintiffs that very limited relief. If enacted, however, the PFA and FPA would amend the EPA in a way that allows plaintiffs to recover compensatory and punitive damages on claims under which they could not even recover *equitable relief* under Title VII. This would be a very dramatic change in the logistics of the EPA that were probably not originally contemplated when the law was enacted in 1963, and tantamount to forcing a motorcycle to tow a 40-foot trailer home – this vehicle was simply *not built* to haul such a colossal load.

C. Class Action Procedural Rules Under The Proposed EPA Amendments

Both the PFA and the FPA would amend the EPA to change the procedural rules regarding class actions. Currently, under the EPA, a plaintiff can bring only an individual action or a collective action, where class members must affirmatively opt in to participate in the action. See 29 U.S.C. § 216(b) (providing that an action can be brought “by any one or more employees for and in behalf of himself or themselves and other employees similarly situated”). Plaintiffs opt in by executing a written consent in order to become a party to the lawsuit. *Id.* (“No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.”); *Kinney Shoe Corp. v. Vorbes*, 564 F.2d

²⁰ See *Spaulding*, 740 F.2d at 707-08.

²¹ See *id.*

²² See *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974).



859, 861 (9th Cir. 1977), *disapproved on other grounds in Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165 (1989).

The PFA and the FPA would amend the EPA to permit class actions under Federal Rules of Civil Procedure Rule 23. *See* H.R. 12, 111th Cong. § 3 (2009) (“Notwithstanding any other provision of Federal law, any action brought to enforce section 6(d) may be maintained as a class action as provided by the Federal Rules of Civil Procedure.”); S. 904, 111th Cong. § 5 (2009) (“Any such action may be maintained as a class action as provided by the Federal Rules of Civil Procedure.”). The impact of this amendment would be to allow employees alleging pay discrimination under the EPA to bring an opt-out class action, where class members are included in the class unless they specifically exclude themselves. *See* Fed. R. Civ. P. 23(b)(3). Historically, the two types of actions, opt-in collective actions and class actions under Rule 23, are mutually exclusive, so if the amendment passes, EPA collective actions would likely disappear. *See LaChapelle v. Owens-Ill., Inc.*, 513 F.2d 286, 289 (5th Cir. 1975).

Employers should be wary of the opt-out amendment to the EPA because it will likely increase the number of class actions filed under the Equal Pay Act and make it easier to obtain certification of those issues. According to EEOC statistics, in 2001, the EEOC only received 1,251 charges under the Equal Pay Act compared to 7,026 charges with compensation issues filed under Title VII. *See* Equal Pay Act Charges, EEOC, available at <http://archive.eeoc.gov/stats/epa.html>; Title VII Charges with Compensation as an Issue, EEOC, available at <http://archive.eeoc.gov/epa/stats-vii.html>. Presumably, if Congress makes the EPA more analogous to Title VII—and easier to file claims—the more likely the number of EPA charges will resemble those of Title VII.

Furthermore, some courts faced with equal pay discrimination claims find that such claims are amenable to class treatment. In the largest sex discrimination class action in the country, the district court and two judges of a three-judge appellate panel held that plaintiffs’ equal pay claims under Title VII could be certified under Rule 23(b)(2). *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 141 (N.D. Cal. 2004) (granting class certification in class action alleging women were paid less than men in comparable positions, in violation of Title VII), *affirmed by* 509 F.3d 1168 (9th Cir. 2007), *rehearing en banc granted by* 556 F.3d 919 (9th Cir. Feb. 13, 2009). In *Dukes*, the plaintiffs alleged that women employed in Wal-Mart stores were paid less than men in comparable positions, despite having higher performance ratings and greater seniority. The proposed class covered at least 1.5 million women who were employed over five years at about 3,400 Wal-Mart stores. The court held that plaintiffs’ equal pay claims were amenable to class treatment because individuals who were paid less for comparable work could be identified by objective criteria, through the use of computer software, and would not require an individualized inquiry.

The *Dukes* case foreshadows the type of unequal pay class action that is likely to pop up if the Equal Pay Act is amended. Under *Dukes*, objective criteria such as job descriptions and pay grades can be used as common proof of an employer’s practice or policy of discrimination. Furthermore, the use of computer software to identify employees and pay disparities quickly may evidence the ease with which the court can assess damages on a class-wide basis. Ultimately, given employers’ widespread use of job descriptions, pay grades, and companywide software to track wages, if the amendments pass, plaintiffs will have an easier time proving Rule 23’s class certification



requirements. *Dukes* is on appeal before the Ninth Circuit en banc, so employers should continue to monitor this case closely.

The only upshot for employers if the EPA is amended to allow opt-out class actions is that the requirements for certification under Rule 23 are more rigorous than a collective action. For example, under Rule 23(b)(3), a court must find that common issues predominate. *See* Fed. R. Civ. P. 23(b)(3). By contrast, a court may conditionally certify a collective class action if it finds there are other employees who are merely “similarly situated” to plaintiff—a standard far less stringent than Rule 23. *Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165, 174 (1989). However, the increased requirements are of little solace to an employer faced with a dramatic increase of equal pay class actions and the costs that inevitably come with defending them.

D. Affirmative Defenses Under The Proposed EPA Amendments

Changes to the affirmative defenses currently available under the EPA are especially noteworthy. As discussed above, under the current EPA, employers can defeat a pay discrimination claim by proving the pay decision was based on “any factor other than sex.” The pending legislation would shift the burden to employers to prove that the factor other than sex: (1) is not based upon or derived from a sex-based differential in compensation; (2) is job-related with respect to the position in question; and (3) is consistent with business necessity.

1. The Paycheck Fairness Act

Likely in part as a concession to the fact that a plaintiff need not prove discriminatory intent, formerly, the EPA permitted a liberal amount of room in which employers could operate to defend compensation decisions that, while perhaps not predicated on discretely articulated reasoning, were in fact predicated on a holistic analysis of an employee’s worth, and not the products of intentional discrimination.²³ The “factor other than sex” defense has since permitted the invocation of a range of business-oriented justifications, where while it has generally been considered necessary that there be a legitimate business purpose behind the discrepancy, it has generally not been the case that such purpose or reason be something fundamentally related to the worker’s performance of the specific job.²⁴ The circuits have been split on whether or not the factor must have a “business purpose,” but it has universally been the case that employers have been granted some leniency to present their own rationality and not have it questioned by a less business-savvy judge.²⁵

The language of the PFA amends the EPA’s “factor other than sex” defense, by requiring such a factor to now be “a bona fide factor other than sex, such as education, training, or experience,” and noting that said factor:

²³ *Id.*

²⁴ *see Horner v. Mary Inst.*, 613 F.2d 706, 714 (8th Cir. 1980)(noting “an employer may consider the market place value of the skills of a particular individual when determining his or her salary.”); *see also Groussman v. Respiratory Home Care*, 1985 WL 5621 at *5, (C.D.Cal.1985)(accepting “prior salary” as a legitimate factor other than sex); *see also Winkes v. Brown Univ.*, 747 F.2d 792, 798 (1st Cir. 1984)(accepting justification that University had to provide a raise to one employee of substantially the same ability as her male counterpart in order to prevent her from leaving for another job).

²⁵ *see* H.R. Rep. No. 110-73, at 25 (2008).



*“shall apply only if the employer demonstrates that such factor (i) is not based upon or derived from a sex-based differential in compensation; (ii) is **job-related** with respect to the position in question; and (iii) is consistent with **business necessity**. Such defense shall not apply where the employee demonstrates that an alternative employment practice exists that would serve the same business purpose without producing such differential and that the employer has refused to adopt such alternative practice.”²⁶ (emphasis added).*

This language is conspicuously similar to that applied in Title VII to describe the few instances where gender is a permissible discriminatory determinant for an employment decision, (“... *bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise...*”).²⁷ Further, there is considerable legislative history to suggest that the language of the amendment is intended to incorporate the Title VII working definitions for “job-relation” and “business necessity.”²⁸

The effect of this change would be the preclusion of any defense offered by an employer for a wage determination being made based on things like market conditions, the firm’s own financial circumstance, or the need to offer a raise in order to retain a given worker at a given moment, as these are not related to performance of the job itself.²⁹ Moving forward, an employer must be able to point to a specific reason that the higher paid employee adds more value to the company than his or her lesser-paid counterpart. Said employer must further be endlessly vigilant in ensuring that those employees hired when labor is at a low point of demand have wages raised to match any subsequent hires made during a period when the demand for labor is greater. Failure to do so would create a presumption of discrimination, the penalty for which an employer could only avoid by citing salary-determining criteria that were completely irrelevant at the time of the hires.

This narrowing of the defense creates a glaring inequity between the position of a plaintiff and a defendant. The plaintiff, who still needs not affirmatively prove discrimination, gets the added advantage of requiring the defendant to itself overcome a de facto presumption of discrimination whenever a difference in pay is identified.

Piecing the larger picture back together, one realizes quickly how the significant narrowing of this defense could spell real concern for employers in the “class action” context. Even the most vigilant and non-discriminatory employer in the world is bound to have hired some men and women for the same job at different periods in the firm’s development. If even just a few of these can use the new retaliation protections to band together they can provide heavy pressure, even in the form of potential punitive damages, against an employer who has not actually discriminated, but will

²⁶ see H.R. 12 § 3.

²⁷ see 42 U.S.C. 2000e-2(e)(1).

²⁸ see H.R. Rep. No. 110-73, at 29-30 (2008). One would be remiss to ignore the fact that the two contexts in which these terms are used are themselves fundamentally different. The language, as it appears in 42 U.S.C. 2000e-2(e), describes the rare instance where an Employer can defend an employment decision made where the consideration of protected class itself serves as the justification for the discrimination. E.g. hiring only male actors to play male roles in a movie. Whether or not these different contexts will impact the way judges treat the working definitions of the terms “business necessity” and “job-relation” in practice is yet to be seen.

²⁹ see id at H131 (statement of Rep. Capps).



recognize the difficulty in showing so at trial, and be willing to settle non-meritorious claims quickly and often.

2. The Fair Pay Act of 2009

The FPA aims to extend coverage of the Equal Pay Act to cover other protected classes (race or national origin) in line with the wording of Title VII of The Civil Rights Act of 1964, but only insofar as such protected classes are affected by discrimination under the new cause of action as provided for by The Fair Pay Act of 2009.³⁰ This cause of action is one commonly referred to as “comparable worth” discrimination.³¹

To date there has been no public discussion about these pending pieces of legislation, with the exception of a speech given by Representative Norton at the time of the bill’s introduction. Congresswoman Norton, detailed the nature of “comparable worth theory,” but provided no commentary on the specifics of her bill’s wording or intended interpretation.³² Accordingly, we have no guidance in interpreting the meaning of the section detailing affirmative defenses outside of our own analytic reading.

The defenses detailed apply only to the new “comparable worth” action created by proposed amendment (h)(1)(A) and read as follows:

(B) Nothing in subparagraph (A) shall prohibit the payment of different wage rates to employees where such payment is made pursuant to – (i) a seniority system; (ii) a merit system; (iii) a system that measures earnings by quantity or quality of production; or (iv) a differential based on bona fide factor other than sex, race or national origin, such as education, training or experience, except that this clause shall apply only if – (I) the employer demonstrates that – (aa) such factor – (AA) is job-related with respect to the position in question; **or** (BB) furthers a legitimate business purpose, except that this item shall not apply if the employee demonstrates that an alternative employment practice exists that would serve the same business purpose without producing such differential and that the employer has refused to adopt such alternative practice.³³ (emphasis added)

Here there appears to be yet another way of approaching the “factor other than sex” defense; the practical effect of which likely results in no substantive alteration to the present state of the law under the EPA. The disjunctive phrasing which connects the “job-relation” requirement to the “legitimate business purpose” requirements seems to give the defendant an option as to which grounds on which it wants to establish its defense. The latter of these two grounds is an explicit phrasing of the principle that had derived from the case law of the original EPA from 1963 to date.

Even this legitimate business purpose standard however seems more limited under the

³⁰ *Id.*

³¹ Discussed *supra*.

³² 155 CONG. REC. E999 (daily ed. April 28, 2009) (statement of Rep. Norton)

³³ *See* H.R. 2151



proposed language of the FPA, as employees are permitted to challenge such a justification, and liability will attach if an employer rejects an alternative business solution which the Court (and not the employer) has deemed of comparable efficacy.

E. Standards For “Equating Jobs” Under The FPA

The EPA prohibits employers from paying employees of one sex less than employees of the opposite sex for performing equal work in jobs that require equal skill, effort, and responsibility, and that are performed under similar working conditions. Plaintiffs can establish a *prima facie* claim by showing that the work performed is *substantially equal*. See *Hein v Or. College of Educ.*, 718 F.2d 910, 913 (9th Cir. 1983). Under the EPA, jobs that require different skills are not substantially equal. *Hein*, 718 F.2d at 914. While the jobs need not be identical, consequential differences may not be ignored.³⁴ *Id.* Evidence that the positions are interchangeable can support a *prima facie* case that the positions are substantially equal. See *Beck-Wilson v. Principi*, 441 F.3d 353, 360 (6th Cir. 2006).³⁵

The proposed FPA would prohibit employers from paying employees in a job dominated by a particular sex less than employees in a job dominated by the opposite sex if the jobs are *equivalent* and in the same establishment. The FPA defines “equivalent jobs” as jobs that have equivalent requirements when viewed as a composite of skills, effort, responsibility, and working conditions.

While it may appear that the EPA’s “substantially equal” standard is similar to the FPA’s “equivalent job” standard, it remains to be seen whether the FPA will, in fact, alter the EPA standard. This is so because Rep. Eleanor Holmes Norton, author of the FPA, has previously focused on a “comparable worth” standard.

Under the “comparable worth” doctrine, wage discrimination arises when the job structure within a firm is substantially segregated by gender, race, or category, and workers of one category are paid less than workers of another category even though the two groups are performing work that is not the same but is of comparable worth to their employer. Ellen Frankel Paul, *Equity and Gender: The Comparable Worth Debate* 10 (HOEPLI EDITORE, 1989).³⁶

When introducing the FPA into the House of Representatives on April 28, 2009, Rep. Eleanor Holmes Norton stated:

³⁴ For example, in *Hein v. Or. College of Educ.*, the Ninth Circuit held that the position of a female associate professor who lectured 100% of the time was not substantially equal to the position of a male assistant professor who was hired specifically to improve the performance of the men’s varsity basketball team and spent 75% of his time teaching and 25% of his time coaching. *Id.* at 914. As a coaching job required skills that were different from a non-coaching job, the differences were not inconsequential. *Id.* Even though the associate professor had coaching skills, her position did not require the use of those skills; thus, they were not relevant considerations when determining substantial equality. *Id.*

³⁵ In *Beck-Wilson v. Principi*, the employer had advertised for either nurse practitioners or physician assistants to fill open positions and a chief of staff had authored a memo stating that the positions had similar responsibilities. *Id.* at 360. The Sixth Circuit appellate court held that this was sufficient to establish that the nurse practitioners, who were predominantly female, performed similar functions and had similar responsibilities as the physician assistants, who were predominantly male. *Id.* Their positions were, therefore, substantially equal. *Id.*

³⁶ Accessible at <http://books.google.com/books?id=G-C2Z7TfYh4C&printsec=frontcover#PPA10,M1>



We introduce the FPA because the pay problems of many women today stem from sex segregation between the jobs that women and men traditionally do. Two-thirds of white women, and three quarters of African-American women, work in just three areas: sales and clerical, service, and factory jobs despite women's superior education to men for several decades. . . . The FPA recognizes that, if men and women are doing comparable work, they should be paid a comparable wage. For example, if a woman is an emergency services operator, a female-dominated profession, why is she often paid considerably less than a fire dispatcher, a male-dominated profession? Is this because each of these jobs has been dominated by one sex? The Fair Pay Act does not decide this issue, but the bill does allow women to show that some or all of the wage disparity is gender based. The burden is on the female plaintiff, a difficult case to make in a market economy, but women deserve the right to carry that burden in appropriate cases.

Moreover, when Rep. Norton was head of the EEOC, she made the comparable worth issue one of the priorities of her tenure. Ellen Frankel Paul, *Equity and Gender: The Comparable Worth Debate* 88 (HOEPLI EDITORE, 1989).³⁷ While chairing the EEOC, she commissioned a study of the comparable worth issue by the National Research Council of the National Academy of Sciences. *Id.*

Rep. Norton's previous support for the "comparable worth" doctrine and her speech during her introduction of the bill to the House, however, lend credence to the possibility that the FPA may incorporate some aspects of the "comparable worth" doctrine. First, Rep. Norton stated that the FPA recognizes that comparable wages should be paid for comparable work. The court in *Spaulding* had characterized the plaintiff's evidence as proof of comparable work and held that it was insufficient to establish a showing of substantial equality. If "comparable work" is the standard under the FPA, we can infer that the plaintiff's burden to make a FPA *prima facie* case of wage discrimination would be less onerous than the burden of proving substantial equality. Second, Rep. Norton's comment that the FPA was introduced to remedy the wage disparity caused by historical segregation of jobs among the sexes is similar to how the plaintiffs' in *Christensen, Am. Fed'n of State*, and *Int'l Union* have justified the use of the "comparable worth" doctrine. Third, the composite approach adopted by the FPA would allow a comparison of jobs that have different emphasis on different requirements, an approach that the *Spaulding* court rejected.

The FPA is unlikely to incorporate the "comparable worth" doctrine wholly. Rep. Norton states that plaintiffs under the FPA must make their case without ignoring market realities. In contrast, as explained in *Christensen* and *Am. Fed'n of State*, the "comparable worth" doctrine does not allow the employer to take prevailing market rates into account when setting wages.

IV. Responding to the Changing Equal Pay Laws

The current health care debate has sidelined President Obama and the Democratic-controlled Congress. As a result, neither the PFA or the FPA have made much progress. That will likely change in 2010, and employers should expect to face a radically amended EPA, as well as the already existing challenges posed by the Ledbetter Act. The confluence of these new laws almost certainly will result in an increased number of EEOC charges and investigations, more

³⁷ Accessible at <http://books.google.com/books?id=G-C2Z7TfYh4C&printsec=frontcover#PPA88,M1>



comprehensive OFCCP audits, and emboldened plaintiffs' attorneys. All of this means that there is an increased risk that employers will face discrimination claims based on old employment decisions. As a result, it is more important than ever for employers to assess their compensation policies and take reasonable steps to identify any areas of potential disparity.

The most obvious and first step for an employer to protect itself is to audit compensation. This would entail having the company compile and analyze personnel data on pay to conduct equal pay analysis of employees doing the same work at the same geographic locations. A significant part of this analysis turns on a determination of what is the "same work," under the same or similar working conditions. In addition, the employer must consider whether there are any jobs which are predominantly one sex or another, which might support plaintiffs' argument that the pay differences between such jobs is sex-based. For example, are there parallel, similar job categories in which each category is dominated by one gender and where the pay of the female-dominated category is lower than in the male dominated one?

As part of such an audit, the company will need to look back as far as necessary to determine whether any of the company's current employees' compensation is affected by past-decisions or other practices. The employer must also not limit its inquiry to specific compensation decisions, such as initial wage determinations and raises. Rather, it must consider all practices, including job placements, transfers, promotions and even training opportunities that might arguably affect current compensation.

If the employer identifies a problem, it will need to determine how best to limit its liability. Among other things, the employer could consider adjusting employee compensation so that past decisions are no longer a factor in current pay.

The increased risk of litigation makes it critical for employers to work with attorneys in conducting audits so that the reviews will be privileged and not discoverable. Thinking ahead, employers will need to make sure that their human resources departments and managers document and maintain records regarding employment actions that might affect compensation down the road – including documents regarding how salaries are set at time of hire or relating to promotions and pay raises.



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Appendix A

A Brief Summary of Cases Citing the Ledbetter Act (through 2/1/2010)

AT&T v. Hulteen, 129 S.Ct. 1962, 1964-65 (2009)

"A recent §706(e) amendment making it 'an unlawful employment practice...when an individual is affected by application of a discriminatory compensation decision or other practice, including each time...benefits [are] paid, resulting...from such a decision' does not help Hulteen. AT&T's pre-PDA decision not to award Hulteen service credit for pregnancy leave was not discriminatory [because it was part of a bona fide seniority system that was legal at the time of its institution], with the consequence that Hulteen has not been 'affected by application of a discriminatory compensation decision or other practice.'"

Rzepiennik v. Archstone-Smith, Inc., No. 08-1129, 2009 WL 1513994 at *4 (10th Cir. Apr. 2, 2009)

"The Act amends Title VII with respect to the date of occurrence of discriminatory compensation claims... [t]here is no indication in the new law that Congress intended [the] change to affect retaliation claims..."

Lipscomb v. Winter, No. 08-5452, 2009 WL 1153442 at*1 (D.C. Cir. June 2, 2009)

"It is ordered, on the court's own motion, that the appellant's claims regarding appellee's nonpromotion decisions be remanded to the district court for further consideration in light of the Lilly Ledbetter Fair Pay Act of 2009."

Hester v. North Ala. Center For Educational Excellence, No. 08-17037, Slip Copy, 2009 WL 3824779 (11th Cir. Ala., Nov. 17, 2009)

Because Plaintiff showed that Defendant continued to pay her under the same compensation scheme through the time she filed her EEOC charge, her claim is not untimely under the Ledbetter Act.

Shea v. Clinton, No. 08-5491, 2009 WL 1153448 at *1 (D.C. Cir Apr. 2, 2009);

"It is ordered that the motions for leave to amend the statement of issues and file a new opposition and a new motion for summary reversal be granted.... The passage of the Lilly Ledbetter Fair Pay Act of 2009 is an intervening change in the law altering the basis of the district court decision at issue on appeal..."



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Miller v. Kempthorne, No. 08-2466-cv, 2009 U.S. App. LEXIS 27952 (2d Cir. N.Y. Dec. 21, 2009)

The Ledbetter Act applied retroactively to the employee's case, and provided that each payment of wages constituted an actionable claim. However, the employer was still entitled to summary judgment, because the employee failed to show that the alleged retaliatory wage discrimination was the result of his assistance to another employee filing a sexual harassment complaint, nor to his age or disability.

Lerman v. City of Fort Lauderdale, No. 09-10420 2009 U.S. App. LEXIS 21380 (11th Cir. Fla. Sept. 28, 2009)

Ledbetter Act does not apply to the issue of whether it is lawful for an employee to knowingly and lawfully waive his rights under the ADEA.

Mikula v. Allegheny County, 583 F.3d 181 (3d Cir. 2009)

Under the Ledbetter Act, the Appellant's Title VII pay discrimination claims were timely as to paychecks that she received within 300 days before she filed her administrative charge, if they reflected a periodic implementation of a previously made intentionally discriminatory employment decision or other practice. Despite its earlier decision, the court held that the failure to answer a request for a raise qualified as a compensation decision; however, the court affirmed that defendant's investigative report did not constitute a pay decision or other practice.

Ganheart v. Xavier Univ. of La., No. 09-30094, 2009 U.S. App. LEXIS 20198 (5th Cir. La. Sept. 10, 2009)

Appellant's last day of employment with defendant employer comports with the Ledbetter Act's definition of when an unlawful employment practice occurs, with respect to discrimination in compensation: when a discriminatory compensation decision or other practice is adopted; when an individual becomes subject to a discriminatory compensation decision or other practice; or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.

Rzepiennik v. Archstone-Smith, Inc., 331 Fed. Appx. 584 (10th Cir. 2009)

The Ledbetter Act not intended by Congress to affect retaliation claims such as Rzepiennik's SOX claim.

Petition for certiorari filed 8/7/09, by Kenneth B. Wills, pro se, of Tallahassee, Fla. (Wills v. Potter, U.S., No. 09-433, cert. denied 11/16/09)

Certiorari denied on question of whether Eleventh Circuit erred in failing to consider applicability of Ledbetter Act, where employee established the elements of a Title VII retaliation claim, but the employer Service offered a legitimate, nonretaliatory reason for its actions—the employee's excessive absences—that the employee failed to show was pretextual.



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Petition for certiorari filed 5/1/09, by Robert S. Mirin, of Harrisburg, Pa., and Matthew D. Clayton, of Philadelphia, Pa. (Clayton v. Pennsylvania Dep't of Welfare, U.S., No. 08-1360, cert. Denied 10/5/09)

Certiorari denied where Third Circuit held prior to passage of Ledbetter Act that African American physician's claims that state hospital where he worked part time engaged in unlawful racial discrimination and retaliation against him between 1999 and 2003 in violation of Title VII of 1964 Civil Rights Act by, among other things, reducing his on-call time, were time-barred.

Moore v. Napolitano, 2009 U.S. Dist. LEXIS 113222 (E.D. La. Dec. 3, 2009)

Under the Fair Pay Act, a federal employee may pursue a Title VII claim regardless of when a discriminatory pay decision was made as long as the employee received disparate compensation resulting from the decision within the relevant limitations period. The Fair Pay Act does not supersede National R.R. Passenger Corp. v. Morgan, 531 US 1001 (2002), which held that a plaintiff may not file an administrative charge with respect to discrete acts (e.g., failure to promote claims) that did not occur within the appropriate limitations period, even when they are related to timely filed charges.

Low v. Chu, Case No. 09-CV-0505-CVE-PJC, 2009 U.S. Dist. LEXIS 111623 (N.D. Okla. Dec. 1, 2009)

The Ledbetter Act did not "severely limit and/or overturn" Morgan, with regard to alleged continuing violations involving discriminatory hiring, promotion or position-advertising practices.

Haase v. Gov't of the V.I., Civil Action No. 02-110, 2009 U.S. Dist. LEXIS 107445 (D.V.I. Nov. 17, 2009)

The legislative history of the Ledbetter Act reveals that Congress intended to create a back pay recovery period that was longer than the statute of limitations, stating that victims of pay discrimination are entitled to the full back pay amount available- back pay for up to two years preceding the charge, as already provided under [42 U.S.C. § 2000e-5(g) (1)]. This section is added to ensure that back pay in cases such as Ledbetter are not limited to 180 [or 300] days.

Joseph v. Pennsylvania, CIVIL ACTION NO. 06-4916, 2009 U.S. Dist. LEXIS 107136 (E.D. Pa. Nov. 16, 2009)

Ledbetter Act is inapplicable to claim of discrimination based on defendant's failure to hire, where no authority provided to prove that a failure to hire constitutes a compensation decision.

Ragsdale v. Holder, Civil Action No. 07-1256 (RBW), 2009 U.S. Dist. LEXIS 101505 (D.D.C. Nov. 2, 2009)

The Fair Pay Act only alters the remedy available to plaintiffs alleging discriminatory compensation decisions, not discrete discriminatory acts.



Cleveland v. La-Z-Boy, CIVIL ACTION NO. 4:08cv132-DPJ-LRA, 2009 U.S. Dist. LEXIS 100227 (S.D. Miss. Oct. 27, 2009)

Failure to promote claims do not challenge a 'compensation decision' as contemplated by the Fair Pay Act.

See also *Harris v. Auxilium Pharm., Inc.*, No. 4:07-cv-3938, 2009 U.S. Dist. LEXIS 109474, 2009 WL 3157275, at *29-31 (S.D. Tex. Sept. 28, 2009)

EEOC v. Sterling Jewelers, Inc., 08-CV-00706(A)(M), 2009 U.S. Dist. LEXIS 122102 (W.D.N.Y. Oct. 1, 2009)

Congress did not amend the statute [through Ledbetter Act] in response to *Occidental's [Occidental Life Insurance Co. of California, v. E.E.O.C., 432 U.S. 355, 359-60, 97 S. Ct. 2447, 53 L. Ed. 2d 402 (1977)]* holding that Title VII does not impose a statute of limitations on actions by the EEOC, nor did it do so in response to *General Telephone's [General Telephone Co. of the Northwest, Inc. v. E.E.O.C., 446 U.S. 318, 326, 100 S. Ct. 1698, 64 L. Ed. 2d 319 (1980)]* holding that EEOC enforcement actions are not limited to claims asserted in the employee's administrative charge.

Schengrund v. Pa. State Univ., Civil Action No. 4:07-CV-718 =, 2009 U.S. Dist. LEXIS 90349 (M.D. Pa. Sept. 30, 2009)

Because Congress' clear intent with the Fair Pay Act was to "restore the law that was in place prior to the Ledbetter decision," *Mikula*, No. 07-4023, 2009 U.S. App. LEXIS 20217 at *11, the holding in *Ledbetter* no longer applies to Title VII cases, therefore the Court declines to apply it to a different statute, the Pennsylvania Human Rights Act.

Powell v. Duval County Sch. Bd., Case No. 3:07-cv-361-J-32MCR, 2009 U.S. Dist. LEXIS 88956 (M.D. Fla. Sept. 28, 2009)

Where plaintiff is not alleging a "discriminatory compensation decision," but rather is alleging sexual discrimination and retaliation by failure to promote or pay an allegedly promised wage increase, both discrete acts, the Ledbetter Act does not apply.

Holloway v. Best Buy Co., No. C 05-5056 PJH, 2009 U.S. Dist. LEXIS 50994 (N.D. Cal. May 28, 2009)

The Ledbetter Act establishes that the unlawful employment practice is the payment of a discriminatory salary, not the original setting of the pay level (although that can be discriminatory as well). Allegedly discriminatory initial work assignments are not actionable under a continuing violations theory, to the extent that they affect compensation on subsequent assignments, where Plaintiffs' administrative charges with respect to the initial assignments were all filed outside the respective limitation periods.

Tomlinson v. El Paso Corp., Civil Action No. 04-cv-02686-WDM-MEH, 2009 U.S. Dist. LEXIS 77341 (D. Colo. Aug. 28, 2009)



The Ledbetter Act preserves the existing law concerning when a discriminatory pension distribution or payment occurs, i.e., upon retirement, not upon the issuance of each check. However, where a charge of discrimination was filed by an active employee and concerns employer contributions to a retirement plan, the Ledbetter Act may apply because the Act covers "wages, benefits, or other compensation," which appears to include employer contributions to a pension plan. It provides that a discriminatory act occurs when an individual is "affected" by the application of a discriminatory compensation decision or other "practice," which could plausibly include the accrual of pension benefits.

Onyiah v. St. Cloud State Univ., Civ. No. 08-4948 (JMR/RLE), 2009 U.S. Dist. LEXIS 85333 (D. Minn. Aug. 27, 2009)

Since the Fair Pay Act applies only to pay discrimination claims, and the Plaintiff fails to link the University's failure to hire him to his pay discrimination claims, the Fair Pay Act does not apply and Plaintiff's claim is not timely.

Lohn v. Morgan Stanley DW, Inc., Civil Action No. H-06-3690, 2009 U.S. Dist. LEXIS 75830 (S.D. Tex. Aug. 26, 2009)

The Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009), applies to claims brought under the Texas Commission on Human Rights Act, Tex. Lab. Code Ann. § 21.051, because the statute states that the purpose of the Act is to work in parallel with Title VII and its amendments. TEX. LAB. CODE § 21.001(1).

Luongo v. St. Paul Travelers, 07 CV 11282 (LAP), 2009 U.S. Dist. LEXIS 69371 (S.D.N.Y. Aug. 7, 2009)

The newly enacted Fair Pay Act, which amends 42 U.S.C. § 2000e-5(e)(3), supersedes Ledbetter only as it relates to the timeliness of discriminatory compensation claims

Klebe v. Univ. of Tex. Sys., 649 F. Supp. 2d 568 (W.D. Tex. 2009)

In adopting that the Texas Commission on Human Rights Act (TCHRA), the Texas legislature stated that one of its express purposes was to provide for the execution of the policies of Title VII of the Civil Rights Act of 1964 and its subsequent amendments. Tex. Lab. Code Ann. § 21.001(1). Because the Texas legislature intended for the TCHRA to provide for the execution of the "policies" of Title VII, and its subsequent amendments, Texas courts would look to the Lilly Ledbetter Fair Pay Act (Act), which amended Title VII, in deciding when a discrimination claim under the TCHRA accrues.

Prince v. City of Milwaukee, Case No. 09C0442, 2009 U.S. Dist. LEXIS 67474 (E.D. Wis. July 29, 2009)

Although the Lilly Ledbetter Fair Pay Act of 2009 overturned the holding of Ledbetter as it applies to "discrimination in compensation," 42 U.S.C. § 2000e-5(e)(3), plaintiff does not allege that she was subject to any such discrimination or otherwise argue that the new legislation affects the legal



standards applicable to her claim. Plaintiff alleged that she was subject to a discriminatory disciplinary decision to demote her.

Logan v. Town of Gilbert, No. CV 08-2301-PHX-JAT, 2009 U.S. Dist. LEXIS 69172 (D. Ariz. July 29, 2009)

The Fair Pay Act eliminates the 300 day time-bar for those of Plaintiff's claims pertaining to a discriminatory compensation decision. However, all of Logan's claims falling outside of this context, such as discriminatory work assignments, are subject to the 300 day limitation.

Speer v. Mountaineer Gas Co., Civil Action No. 5:06CV41, 2009 U.S. Dist. LEXIS 65088 (N.D. W. Va. July 28, 2009)

The recently enacted Lilly Ledbetter Fair Pay Act of 2009 ("Fair Pay Act"), which concerns discriminatory compensation, does not appear to be applicable to this action, which concerns discrete discriminatory acts other than pay. Plaintiff does not allege that he was paid differently from others doing the same work because of his age, but asserts that Mountaineer Gas refused to return him to an M&R job because of his age, a discrete act. Similarly, Plaintiff does not allege that he received lower payments of LTD benefits than others because of his age, but rather that the decision to terminate his LTD benefits was because of his age, another discrete act.

Johnson v. District of Columbia, 632 F. Supp. 2d 20 (D.D.C. 2009)

Where Plaintiff alleges that defendants violated Title VII, the ADA, and the Rehabilitation Act by paying him less than similarly situated females and similarly situated non-disabled employees -- that is, a "discriminatory compensation . . . practice" within the meaning of the Fair Pay Act. Hence, there can be no dispute that, under the Fair Pay Act, plaintiff may seek relief under those federal laws notwithstanding the fact that, by his own account, the alleged discriminatory pay practice began years before he filed a charge of discrimination with the EEOC on July 11, 2005.

Richards v. Johnson & Johnson, Inc., Civ. Action No. 05-3663, 2009 U.S. Dist. LEXIS 46117(D.N.J. June 2, 2009)

While the Fair Pay Act contains expansive language in superseding the holding in Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 127 S. Ct. 2162, 167 L. Ed. 2d 982 (2007), it does not purport to overturn Morgan, and thus does not save otherwise untimely claims outside the discriminatory compensation context.

Alexander v. Seton Hall Univ., 983 A.2d 1128 (N.J. App. Div. 2009)

Using the guidance of the federal Title VII jurisprudence, a New Jersey appellate court followed the United States Supreme Court's decision in Ledbetter v. Goodyear Tire & Rubber Co., despite Congress' subsequent adoption of the Lily Ledbetter Fair Pay Act of 2009, as no amendments had been made to the new Jersey Law Against Discrimination that would have affected its construction at the time Ledbetter was decided, and New Jersey jurisprudence subjects the continuing effect of a



past violation to the statute of limitations.

Miller v. Kempthorne, (NO. 08-2466-CV), Slip Copy, 2009 WL 4893670 (N.Y. Ct. App. Dec. 21, 2009)

The Ledbetter Act does not apply to claims that Defendant failed to hire Plaintiff as a permanent employee, nor the claim that Defendant failed to convert Plaintiff to a permanent employee

Chennareddy v. Dodaro, Civ. Action Nos. 87-3538 (EGS), 01-0517(EGS), 06-1002(EGS), 06-1712(EGS), --- F.Supp.2d ----, 2009 WL 5439340 (D.D.C., Dec. 18, 2009)

Supplemental briefing ordered because Ledbetter Act may apply to claim pertaining to discrimination in determining eligibility for a Cost of Living Adjustment.

Tipton v. Northrop Grumman Corp., NO. CIV.A. 08-1267, Slip Copy, 2009 WL 2914365 (E.D.La., Sept. 2, 2009)

Ledbetter Act applies to ADA and Title VII claims of injured employees who were assigned to a rehabilitative work assignment at a lower pay grade but who failed to file an EEOC charge within 300 days of the assignment.

Dixon v. University of Toledo, 638 F.Supp.2d 847 (N.D. Ohio 2009)

Ledbetter Act does not create a cause of action independent of Title VII, ADEA, or ADA, and does not apply to the Equal Pay Act.

Grant v. Pathmark Stores, Inc., NO. 06 CIV.5755 (JGK), Slip Copy, 2009 WL 2263795 (S.D.N.Y., July 29, 2009)

Ledbetter Act applies to claim that Defendant discriminated against Plaintiff upon his promotion to full-time employment when it gave him a \$.20 raise, which was lower than the raises other employees had received.

Raucher v. DHL Global Mail, Inc., NO. 07CV5219(RJD)(SMG), Slip Copy, 2009 WL 2338042 (E.D.N.Y., July 29, 2009)

Ledbetter Act would apply to Plaintiff's allegation that Defendant employer discriminated on basis of age by asking him to take a salary cut during time period more than 300 days prior to EEOC charge, but for Plaintiff's allegation that discrimination began at a later date.

Beekman v. Nestle Purina Petcare Co., 635 F.Supp.2d 893 (N.D.Iowa 2009)

Ledbetter Act does not apply to FMLA claims.



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Richards v. Johnson & Johnson, Inc., No. 05-3663, 2009 WL 1562952 at *9 (D.N.J. June 2, 2009)

"While the Act certainly contains expansive language in superseding the holding in Ledbetter, it does not purport to overturn Morgan, and thus does not save otherwise untimely claims outside the discriminatory compensation context..." [Rejects suggestion that Fair Pay Act reincarnates the "continuing violations doctrine" as applied to retaliation claims.]

Johnson v. Watkins, No. 3:07CV DPJ-JCS, 2009 WL 1507572 at *4 (S.D.Miss. May 29, 2009)

"Plaintiff's compensation was not affected, and the Act has no application."

N'Jai v. Floyd, No.07-1506, 2009 WL 1531594 at 31 (W.D.Pa. May 29, 2009)

"[The act] is retroactive to cases pending on or after May 28, 2007. Here, Plaintiff does not benefit from the Act as Wilkinsburg allegedly stopped paying her in 2005."

Harris v. City of Fresno, No. 1:07-CV-01210-OWW-SMS, 2009 WL 1460822 at *12 (E.D.Cal. May 26, 2009)

Court opts not to decide matter of whether or not "reclassification denial" predicated on race (whereupon plaintiff was paid less than his qualifications suggest he should), is affected as a "compensation" decision under the passage of the Act, because parties did not brief the issue.

Rowland v. Certainteed Corp., No. 08-3671, 2009 WL 1444413, 2009 WL 1444413 at *6 (E.D.Pa. May 21, 2009)

"Rowland's 'failure to promote claim' is not based on a discriminatory compensation claim, [so the Act does not apply]. Furthermore, her argument would eliminate any statute of limitations with respect to reporting discrimination to the appropriate agency, a change in law not found in the Ledbetter Act."

Reed v. Kucera, No.4:08CV3132, 2009 WL 1451568 at *2 (D.Neb. May 20, 2009)

Defendant's argument that the act "does not apply to any claim of discrimination in compensation by Plaintiff under Title VII that was pending before May 27, 2007" misunderstands the applicable date of the act, intended to "take effect as if enacted...one day before the issuance of the Supreme Court's decision."

Equal Employment Opportunity Comm'n v. CRST Van Expedited, Inc., No.07-CV-95-LRR, 2009 WL 1324050 at*7 (N.D.Iowa May 11, 2009)

"The EEOC has not cited any controlling legal authority that indicates it is not bound by any statute of limitations when pursuing relief on behalf of a group of allegedly aggrieved persons under § 2000e-5 absent a showing of a pattern or practice of unlawful employment discrimination. The Ledbetter Act has no relevance here....There is no indication Congress intended the Ledbetter Act



to serve as a trump card that the EEOC might use to supersede all statutes of limitations in our nation's various civil rights acts."

Hines v. N. W. Va. Operations, No.1:08CV144, 2009 WL 1228305 at (N.D.W.Va. May 1, 2009)

"The [Ledbetter] decision and subsequent statute do not affect this Court's analysis." (Plaintiff, appearing *pro se* did not specify the type of employment decision was alleged to be discriminatory, but it is fair to assume the Court read a "discharge" as the act.)

Masterson v. Wyeth Pharm., No.3:08cv484, 2009 WL 1106748 at * (E.D.Va. Apr. 23, 2009)

"Recent revisions to 42 U.S.C. §2000e-5 do not affect [time bar] analysis, as they only pertain to discrimination claims respecting unfair compensation, which is not an issue in this case."

Gentry v. Jackson State Univ., 610 F.Supp.2d 564, 566-67 (S.D.Miss. 2009)

"Court concludes it cannot grant summary judgment [in Defendant's favor] on the limitations basis."
"It can hardly be denied that the denial of tenure was a 'discrete' act of which plaintiff was obviously aware. However, plaintiff has asserted that the denial of tenure also denied her a salary increase and hence was a compensation decision."

Shockley v. Minner, No. 06-478 JFF, 2009 WL 866792 at *1 (D.Del. Mar. 31, 2009)

"The Court has considered the parties' arguments and agrees with Plaintiff that Congress has explicitly overruled the decision and logic of the Ledbetter decision and thereby overruled the Evans decision."

Knox v. Centric Group, LLC, No.3:06-CV-555-RAM, 2009 WL 875513 at *4 (D.Nev. Mar. 30, 2009)

"Plaintiff is not challenging the present effects of a discriminatory practice that occurred prior to the charging period. Rather, she is alleging that the pay system as administered during the statutory period was facially discriminatory. It is a well-settled proposition that "an employer violates Title VII and triggers a new EEOC charging period whenever the employer issues paychecks using a discriminatory pay structure.""

Aspilaire v. Wyeth Pharm., No.07 Civ.0952, 2009 WL 988648 at *10 (S.D.N.Y. Mar. 30, 2009)

(FN6): "The Act does not, by its terms, apply to cases brought under §1981, as is this one. However, Title VII, to which the Act does expressly apply, and §1981 cases are frequently analyzed under the same framework... For the purposes of [Defendant's summary judgment] motion we accept that under the Act, plaintiff's claim...is timely, because the decision...was made prior to the statutory period, [and] affected the amount of plaintiff's paychecks during the statutory period."
(Summary Judgment granted on other grounds.)



Darensburg v. Metro. Transp. Comm'n, 611 F.Supp.2d 994,1040 (N.D.Cal. Mar 27, 2009)
Appearing in FN4 on page 1040 and with no apparent affect on analysis which follows the Morgan approach to the continuing violation theory.

The Equal Rights Ctr. v. AvalonBay Cmtys., No.AW-05-2626, 2009 WL 1153397 at *8-9 (D.Md. Mar. 23, 2009)
FN6 on page *8: Act completely irrelevant to holding which finds that the "continuing violation" doctrine as spelt out in Morgan and Ledbetter applies to a case dealing with the FHA under Title III.

Musgrove v. Gov't of D.C., 602 F.Supp.2d 141, (D.D.C. 2009)
Defendant withdrew timeliness argument after court previously directed the parties to address the applicability of the Act.

Siino v. Bd. of Trs. of N.Y. City Teachers' Ret. Sys., No.08 Civ.4529, 2009 WL 734076 at *2 (S.D.N.Y. Mar. 13, 2009)
Claims purportedly raised pursuant to passage of the Act by Plaintiff that were never raised by complaint cannot be raised for the first time in a motion for reconsideration.

Goodlett v. Del., Civ. No. 08-298-LPS, 2009 WL 585451 at * (D.Del. Mar. 6, 2009)
Motion to dismiss denied in relevant part on grounds that Defendant cites Ledbetter decision for specific holding that was overturned with Act. "Because the post-2004 portions of the pay disparity claim could nto have been raised in Goodlett's 2004 EEOC charge (since they had not yet occurred), Goodlett's pay disparity claim survives to the extent it relates to the period of 300 days prior to his 2007 EEOC filing."

Maher v. Int'l Paper Co., 600 F.Supp.2d 940, 950 (W.D.Mich. 2009)
From FN5: "The Fair Pay Act of 2009 only affects the Ledbetter decision with respect to the timeliness of discriminatory compensation claims. The more general rule announced in Ledbetter – that a charging period is triggered when a discrete unlawful practice takes place – reaffirmed the principles in Ricks and Morgan and survives the enactment of the Act."

Leach v. Baylor Coll. of Medicine, Civil Action No. H-07-0921, 2009 WL 385450 at *17 (S.D.Tex. Feb. 17, 2009)
"The Fair Pay Act of 2009 only affects the Ledbetter decision with respect to the timeliness of discriminatory compensation claims. The more general rule announced in Ledbetter – that a charging period is triggered when a discrete unlawful practice takes place – reaffirmed the principles in Ricks and Morgan. Courts have applied this rule, as well as the rule that a plaintiff may not sue for a prior discriminatory act outside of the charging period based on the continuing effects of that



act into the charging period, to other types of discrimination claims not involving compensation." (Cites to a Nov. 4, 2008 11th Cir. case for the idea that the Ledbetter decision applies to 'failure to promote' claim. Unclear if this is still good law after the Act.)

Stewart v. Gen. Mills Inc., No.08-CV-16-LRR, 2009 WL 350639 at *9 (N.D.Iowa Feb. 11, 2009)

FN2: Non-compensation related practices at issue make the modification of Fair Pay Act on January 29, 2009 irrelevant for present purposes.

Rehman v. State Univ. of N.Y. at Stony Brook, 596 F.Supp.2d 643, 651 (E.D.N.Y. 2009)

"The Lilly Ledbetter Fair Pay Act of 2009, with a retroactive effective date of May 28, 2007, altered the limitations period to be applied in wage discrimination cases... According to the terms of the Act the plaintiff's wage discrimination claims based upon actions occurring on or after April 13, 2005, two years prior to his EEOC charge, are timely."

Vuong v. N.Y. Life Ins. Co., No.03 Civ. 1075, 2009 WL 306391 at *8-9 (S.D.N.Y. Feb. 6, 2009)

Where Plaintiff could point to another employee's receiving a different percentage in a monthly performance-related compensation schedule within the charging period, and the difference derived from the institution of a February 1998 policy, then the Act was directly on point and defeated Employer's argument relying on the Ledbetter decision. (Note: Decided just a week after passage).

Gilmore v. Macy's Retail Holdings, No. 06-3020, 2009 WL 305045 at *1-3 (D. NJ. Feb. 4, 2009)

Judge, in offering a memorandum opinion on the Court's own motion to consider the impact of the Act, relies very heavily on the Bill's committee report and legislative record. Judge does most of his analysis regarding how far back Plaintiff's damages could run without making a specific determination on whether the particular employment decision is covered by the Act. At least by implication we can presume Judge believes that an employee's not being permitted to fill in for absent associates on account of her race, thereby depriving her of an opportunity to earn bonuses on sales of more expensive products, counts as a "compensation decision" under the Act.

Bush v. Orange County Corr. Dep't, 597 F.Supp.2d 1293, 1295-96 (M.D.Fla. 2009)

"While [Defendant's] untimeliness argument was valid prior to last week, with the passage of the Act Plaintiffs' Title VII claims [regarding race-based pay and promotion decisions] are no longer administratively barred." Though the court does not say so specifically it seems, in referring to "claims" plural that the court sees a "promotion decision" as covered by the Act.



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Appendix B

Current Equal Pay Act Compared to Paycheck Fairness Act and Fair Pay Act of 2009

	Current EPA	Paycheck Fairness Act	Fair Pay Act of 2009
Prima Facie Case	Plaintiff must prove that employees of the opposite sex are paid different wages for equal work in jobs that require equal skill, effort and responsibility, and are carried out under similar working conditions.	No change.	Prohibits paying employees in a job dominated by a particular sex, race, or national origin less than employees in another job dominated by the opposite sex or a different race or national origin, if the jobs are “equivalent” and in the same establishment. “Equivalent jobs” means “jobs that may be dissimilar, but whose requirements are equivalent, when viewed as a composite of skills, effort, responsibility, and working conditions.”
Affirmative Defenses	A wage discrepancy is justified if it is based on: (1) seniority system; (2) a merit system; (3) a system which measures earnings by quantity or quality of production; or (4) a differential based on a factor other than sex.	“Factor other than sex” – employer must prove factor: (1) is not based upon or derived from a sex-based differential in compensation; (2) is job-related with respect to the position in question; and (3) is consistent with business necessity. Employees could rebut the defense by showing that employer would have been able, but refused to, adopt alternative practice that would serve same purpose without producing same result.	“Factor other than sex” – employer must prove: (1) such factor is either job-related with respect to the position in question or furthers legitimate business purpose; and (2) that such factor was actually applied and used reasonably in light of asserted justification. Employees could rebut legitimate business purpose defense by demonstrating that an alternative employment practice exists that would serve the same business purpose without producing such differential and employer has refused to adopt such alternative practice.



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	Current EPA	Paycheck Fairness Act	Fair Pay Act of 2009
Damages	Backpay only, though doubled if employer cannot prove acting in good faith.	Provides for compensatory and punitive damages rather than lost wages only.	
Class Actions	Opt-in collective actions only	Authorizes opt-out class actions.	
Recordkeeping/Reporting Requirements	None.	None.	Employers required to: (1) “preserve records that document and support the method, system, calculations, and other basis used . . . in establishing, adjusting, and determining the wage rates paid to [their] employees;” and (2) create reports based on these records and submit reports to EEOC. Authorizes EEOC to publish this data and make reasonable provisions for inspection and examination by any person.
Other notable provisions		Adds non-retaliation provisions.	Employers cannot reduce other employees’ wages to achieve pay equity.

	Current EPA	Paycheck Fairness Act	Fair Pay Act of 2009
Prima Facie Case	Plaintiff must prove that employees of the opposite sex are paid different wages for equal work in jobs that require equal skill, effort and responsibility, and are carried out	No change.	Prohibits paying employees in a job dominated by a particular sex, race, or national origin less than employees in another job dominated by the opposite sex or a different race or national origin, if the



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	Current EPA	Paycheck Fairness Act	Fair Pay Act of 2009
	under similar working conditions.		jobs are “equivalent” and in the same establishment. “Equivalent jobs” means “jobs that may be dissimilar, but whose requirements are equivalent, when viewed as a composite of skills, effort, responsibility, and working conditions.”
Affirmative Defenses	A wage discrepancy is justified if it is based on: (1) seniority system; (2) a merit system; (3) a system which measures earnings by quantity or quality of production; or (4) a differential based on a factor other than sex.	“Factor other than sex” – employer must prove factor: (1) is not based upon or derived from a sex-based differential in compensation; (2) is job-related with respect to the position in question; and (3) is consistent with business necessity. Employees could rebut the defense by showing that employer would have been able, but refused to, adopt alternative practice that would serve same purpose without producing same result.	“Factor other than sex” – employer must prove: (1) such factor is either job-related with respect to the position in question or furthers legitimate business purpose; and (2) that such factor was actually applied and used reasonably in light of asserted justification. Employees could rebut legitimate business purpose defense by demonstrating that an alternative employment practice exists that would serve the same business purpose without producing such differential and employer has refused to adopt such alternative practice.



	Current EPA	Paycheck Fairness Act	Fair Pay Act of 2009
Damages	Backpay only, though doubled if employer cannot prove acting in good faith.	Provides for compensatory and punitive damages rather than lost wages only.	
Class Actions	Opt-in collective actions only	Authorizes opt-out class actions.	
Recordkeeping/Reporting Requirements	None.	None.	Employers required to: (1) “preserve records that document and support the method, system, calculations, and other basis used . . . in establishing, adjusting, and determining the wage rates paid to [their] employees;” and (2) create reports based on these records and submit reports to EEOC. Authorizes EEOC to publish this data and make reasonable provisions for inspection and examination by any person.
Other notable provisions		Adds non-retaliation provisions.	Employers cannot reduce other employees’ wages to achieve pay equity.